Office-Supreme Court, U.S.
FILED
APR 5 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD A. CABANA, SUPERINTENDENT, ET AL.,

Petitioners,

v.

CRAWFORD BULLOCK, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JOSEPH T. MCLAUGHLIN
Counsel of Record

SHEARMAN & STERLING
53 Wall Street
New York, New York 10005
(212) 483-1000

Of Counsel:
HENRY WEISBURG
DANIEL LEVIN
NICHOLAS ROSTOW
ELSIE CRUM*
*Bar admission pending
Attorneys for Respondent

April 2, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Should this Court review a decision by the United States Court of Appeals for the Fifth Circuit that vacated the death sentence imposed on respondent under a Mississippi statute identified by this Court as conflicting with the requirements of *Enmund v. Florida*, 458 U.S. 782 (1982), and since amended to comply with *Enmund*?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Introduction 1

B. Statement of Facts 2

C. The Former Mississippi Statute 4

D. The Jury Instructions 5

SUMMARY OF THE ARGUMENT 6

ARGUMENT

I. THIS CASE PRESENTS NO ISSUE MERITING REVIEW BY THIS COURT 6

II. THE DECISION BELOW WAS A SIMPLE APPLICATION OF THIS COURT'S DECISION IN *ENMUND* 8

A. *Enmund* Prohibits The Imposition Of The Death Penalty On An Individual Without A Finding That He Killed, Attempted To Kill, Intended To Kill, Or Contemplated That Lethal Force Would Be Used 8

B. Under The Mississippi Statutory Scheme, And As A Matter of Due Process, The *Enmund* Findings Must Be Made By The Jury 8

1. Mississippi Law Requires That The *Enmund* Findings Be Made By The Jury ... 9

PAGE

2. Due Process Requires That The *Enmund* Findings Be Made By The Jury 9

C. Respondent's Death Sentence Was Properly Vacated Because The Jury Was Not Required To Make The *Enmund* Findings 10

CONCLUSION 12

APPENDIX OF CONSTITUTIONAL AND STATUTORY MATERIALS 1a

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases PAGE

Duncan v. Louisiana, 391 U.S. 145 (1968) 10

Enmund v. Florida, 458 U.S. 782 (1982) 1, 2, 5, 6, 7, 8, 9, 10, 12

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 7

Lee v. Madigan, 358 U.S. 228 (1959) 10

Mullaney v. Wilbur, 421 U.S. 684 (1975) 9

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 7

Sandstrom v. Montana, 442 U.S. 510 (1979) 9

Sparf v. United States, 156 U.S. 51 (1895) 10

Thigpen v. Reddix, 105 S. Ct. 397 (1984) 8

United States v. Spock, 416 F.2d 165 (1st Cir. 1969) 10

Other Authorities

U.S. Const. amend. VIII 8

U.S. Const. amend. XIV 8, 10

Miss. Code Ann. § 97-3-19(2)(e) 4

Miss. Code Ann. § 99-19-101 ..... 4, 9

Miss. Code Ann. § 99-19-101(7) 9

Miss. Code Ann. § 99-19-103 9

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, ET AL.,

Petitioners,

v.

CRAWFORD BULLOCK, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction

Respondent, Crawford Bullock, Jr., was sentenced to death by a Mississippi jury for robbery-murder under a statute and jury instructions that did not require a finding that he killed, attempted to kill, intended to kill or contemplated that lethal force be used. In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court specifically recognized the constitutional infirmity of the Mississippi statute under which respondent was sentenced to death. 458 U.S. at 789 n. 5. In a series of decisions, the Court of Appeals for the Fifth Circuit also concluded that the

Mississippi statute in effect when respondent was sentenced was constitutionally defective. The Mississippi legislature has since amended that State's capital sentencing statute to comply with the requirements of *Enmund*. Thus, respondent is one of a handful of victims of an unconstitutional capital sentencing scheme in Mississippi that has since been corrected.

Accordingly, this is a case of no precedential significance. Mississippi has corrected the constitutional infirmity of the capital sentencing statute under which respondent was sentenced to death.[1] Consequently, no similar cases will arise in the future. Moreover, the Fifth Circuit's decision was a simple application of *Enmund* to one of the very statutes identified by this Court as allowing imposition of the death penalty in the circumstances declared unconstitutional in that case. Indeed, the Court recently denied *certiorari* in a case that raised this same legal issue: a death sentence imposed under the old Mississippi statute had been vacated pursuant to *Enmund*.

Respondent could not be condemned to death if he were sentenced today under the same jury instructions. Petitioners should not be allowed one last cruel and unusual punishment before complying with the requirements of *Enmund*. As a result, this Court should deny the petition.

B. Statement of Facts

Respondent is a twenty-seven year old male with an honorable discharge from the military. (TR-1091).[2] Except for the matter under review, respondent has never been accused or convicted of any crime of violence. (TR-1141-43).

On the night of September 21, 1978, after an evening of drinking, respondent and Ricky Tucker were offered a ride home from the Town Creek Saloon in Jackson, Mississippi, by Mark Dickson. (TR-1097). During the ride, respondent, Tucker and Dickson continued drinking (TR-1098), and, after some

---

1 Respondent's conviction is not at issue on this petition.

2 References in this form are to pages of the trial record.

time, Tucker and Dickson began to fight. (TR-1108-09). Dickson stopped the car in an uninhabited area, and he and Tucker got out, followed by respondent, whose leg was broken and in a cast. (TR-1921, 1109). Tucker and Dickson exchanged blows. (TR-1110). Respondent intervened at the early stages of the fight. (TR-1110). The purpose of his intervention is disputed: respondent testified it was to stop the fight (TR-1110); the State argued it was to aid Tucker.

In any event, Tucker swung a liquor bottle at Dickson but hit respondent on the hand, shattering the bottle and opening a wide gash on respondent's hand, which bled profusely.[3] (TR-1110). Respondent backed away and the fight between Tucker and Dickson continued without any participation by respondent. (TR-1111). Tucker gained the upper hand, knocking Dickson down. (TR-1111). Tucker kicked Dickson in the head and jumped up and down on his head. (TR-1111). Tucker then picked up a concrete block and beat Dickson with it, killing him. (TR-1111). Tucker also picked up a wooden board and beat Dickson with that. (TR-1112). The medical evidence established that death was caused by the blows struck by Tucker with the concrete block. (TR-930; 934; 956).

There is no evidence that respondent struck any of the blows that led to Dickson's death. None of respondent's blood was found on the concrete block or the wooden board with which Tucker beat Dickson, or on Dickson's body. (TR-966-85; 1474-86). The absence of respondent's blood from the victim's body and the murder weapon is significant because respondent was bleeding profusely from his hand from the early stages of the fight between Tucker and Dickson (TR-1110), as is evidenced by the fact that his blood was found in a variety of places: a

---

[3] Petitioners' flip statement of facts is both inappropriate and inaccurate. For example, petitioners' statement that there was a "rain of blows" with the bottle (Petition at 9), is without any basis in the record and contradicts the factual recitations by the Mississippi Supreme Court (Appendix to Petition ["A"] at 71), the district court (A25) and the Fifth Circuit (A9).

trail of respondent's blood was found going some fifty yards along the street where the fight took place (TR-487); respondent's blood was found on several cars he attempted to start in order to get away from the fight between Tucker and Dickson (TR-481); his blood-soaked shirt was found at the scene (TR-415; 978); and his blood was found on the boat at the lake where Dickson's body was later hidden. (TR-1016).

Respondent and Tucker were prosecuted under the Mississippi capital robbery-murder statute because there was evidence that Dickson's car and wallet were taken. They were tried separately. Both were convicted. Tucker was sentenced to life imprisonment. Respondent was sentenced to death.

C. The Former Mississippi Statute

Respondent was indicted and convicted under the Mississippi capital robbery-murder provision, which provided:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . .
>
> (e) When done *with or without any design to effect death*, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies . . . .

Miss. Code Ann. § 97-3-19(2)(e) (emphasis added) (2a).[4] Respondent was sentenced to death pursuant to the former Mississippi capital sentencing statute, Miss. Code Ann. § 99-19-101 (3a), which provided that the jury should weigh specified aggravating circumstances against specified mitigating circumstances in determining whether to impose a death sentence. The sentencing statute required that, before a defendant could be sentenced to die, all findings had to be made by the

---

[4] References in this form are to the Appendix, below.

jury but did not require a finding that the defendant killed, intended to kill, attempted to kill, or contemplated that lethal force would be used.

Thus, the former Mississippi statutory scheme allowed the imposition of a death sentence in violation of the Eighth Amendment as interpreted in *Enmund*. In recognition of this fact, the Mississippi capital sentencing statute was amended in March 1983 to require the jury to make one of the *Enmund* findings before a sentence of death could be imposed. Both the former sentencing statute and the current version are reproduced below. (3a; 6a).

D. The Jury Instructions

The critical jury instruction was Instruction 15, delivered during the guilt phase of the trial.[5] It read, in pertinent part:

> [i]f the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in concert with another, while present at said time and place by consenting to the killing of the said Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, *whether done with or without any design to effect the death* of the said Mark Dickson, that then, and in that event, the said Crawford Bullock, Jr., is guilty of capital murder.

(TR-1418-19) (emphasis added).

---

5 The instructions given to the jury at the sentencing phase (TR-1428-34) contained no language whatsoever requiring the jury to find that respondent killed, attempted to kill, intended to kill, or contemplated that lethal force would be used.

SUMMARY OF THE ARGUMENT

This is not a suitable case for *certiorari*. It has no significance beyond the immediate parties. Mississippi has corrected the constitutional defect in the statute under which respondent was sentenced; consequently, no similar cases will arise in the future. There are at most a handful of individuals in respondent's position, all of whom are victims of timing. The lower federal courts are correcting the constitutional defect of the past, and Mississippi already has corrected it for the future. Consequently, this case does not merit review by this Court. Indeed, this Court recently denied *certiorari* in a case presenting this same legal issue: a death sentence imposed under the former Mississippi capital sentencing statute was held not to comply with the requirements of *Enmund*. (Point I).

Moreover, the decision below is a simple application of this Court's decision in *Enmund*. *Enmund* held that an individual could not be sentenced to death without a finding that he killed, attempted to kill, intended to kill or contemplated that lethal force would be used. (Point II.A). As a matter of Mississippi law and of constitutional due process, that finding must be made by the jury. (Point II.B). Because the jury that sentenced respondent to death was not required to make such a finding, his death sentence was properly vacated. (Point II.C).

Consequently, the petition for *certiorari* should be denied.

I

THIS CASE PRESENTS NO ISSUE MERITING REVIEW BY THIS COURT

This case is of no importance beyond the immediate parties. Respondent was sentenced to death under the former Mississippi statute that allowed imposition of the death penalty

without any of the findings required by *Enmund*. Consequently, respondent's jury was not instructed to make, and did not make, any of the *Enmund* findings before sentencing him to death. The Mississippi capital sentencing statute has since been amended to require one of the *Enmund* findings before the death sentence can be imposed. As a result, no similar cases will arise in the future. Respondent is thus, one of a handful of victims of timing; his trial was held during the period of unconstitutionality in the Mississippi capital sentencing scheme.[6]

This Court has repeatedly held that the writ of certiorari is not to be granted in cases the settlement of which is important only to the parties as distinguished from the public. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 & n. 2 (1955) (citing cases in which writs of *certiorari* were dismissed as improvidently granted because "it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance"); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (writ of *certiorari* should be granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); *see also* R. Stern & E. Gressman, *Supreme Court Practice* § 4.11 at 285 (5th ed. 1978).[7] Accordingly, this Court recently denied *certiorari* in a case presenting the same legal issue where, pursuant to *Enmund*, the lower federal courts had vacated the death sentence

---

6 There may be a few people in the same situation as respondent whose death sentences have not yet been vacated. Petitioners were unable to provide this information at oral argument in the Fifth Circuit. Presumably, the lower federal courts will continue to correct any such lingering, constitutionally defective death sentences.

7 Petitioners' argument that this case raises an important issue concerning the deference due findings of state courts is simply incorrect. Because Mississippi law (and due process, *see infra* at 9-10) requires all sentencing findings to be made by the jury in capital cases, the issue below was whether the jury was required to make any of the *Enmund* findings. Since the Mississippi Supreme Court made no finding on that issue, there was no finding to which deference was even arguably due.

imposed on an individual who had been sentenced under the old Mississippi capital sentencing statute by a jury that was not required to find that he killed, intended to kill, attempted to kill or contemplated that lethal force would be used. *Thigpen v. Reddix*, 105 S. Ct. 397 (1984).

II

THE DECISION BELOW WAS A SIMPLE APPLICATION OF THIS COURT'S DECISION IN *ENMUND*

A. *Enmund* Prohibits The Imposition Of The Death Penalty On An Individual Without A Finding That He Killed, Attempted To Kill, Intended To Kill, Or Contemplated That Lethal Force Would Be Used.

On the ground that "punishment must be tailored to . . . personal responsibility and moral guilt," this Court held in *Enmund* that the Eighth and Fourteenth Amendments prohibit the execution of an individual who did not kill, attempt to kill, intend to kill, or contemplate that lethal force would be used. 458 U.S. at 801. In reaching this result, the Court noted that legislatures have regularly rejected the imposition of the death penalty on such defendants. *Id.* Specifically, the Court concluded that only nine states allowed the imposition of the death penalty on defendants with Enmund's level of culpability. One of those nine was Mississippi; foreshadowing this case, the Court singled out the statute under which respondent was sentenced as authorizing an unconstitutional death sentence. *Id.* at 789 n. 5.

B. Under The Mississippi Statutory Scheme, And As A Matter Of Due Process, The *Enmund* Findings Must Be Made By The Jury.

Both Mississippi state law and constitutional due process require that the *Enmund* findings be made by the jury before the death penalty can constitutionally be imposed.

1. Mississippi Law Requires That The *Enmund* Findings Be Made By The Jury.

The Mississippi statutes under which respondent was tried and sentenced required the jury to make all findings at both the guilt and sentencing phases in capital cases. *See* former Miss. Code Ann. § 99-19-101; Miss. Code Ann. § 99-19-103 (3a; 9a). Those statutes, however, did not require the jury to make any of the *Enmund* findings before imposing the death penalty. The 1983 amendments to the Mississippi capital sentencing statute corrected this defect by adding a section requiring the jury to make one of the *Enmund* findings before imposing the death penalty:

> (7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
>
> (b) The defendant attempted to kill;
>
> (c) The defendant intended that a killing take place;
>
> (d) The defendant contemplated that lethal force would be employed.

Miss. Code Ann. § 99-19-101(7) (1983) (9a).

Mississippi law required that all findings in capital cases — including the *Enmund* findings — be made by the jury. Respondent's death sentence was properly vacated because the jury did not make such findings.

2. Due Process Requires That The *Enmund* Findings Be Made By The Jury.

Due process also requires that the *Enmund* findings be made by the jury. An essential component of the right to trial by jury is the requirement that a criminal defendant be convicted only on a finding by the jury that he is guilty beyond a reasonable doubt of all elements of the crime with which he is charged. *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The requirement that all elements of a crime must be found by a jury flows from the "fundamental" role of trial by jury in the American system of criminal justice. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

> The guarantees of jury trial in the Federal and State Consitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the State.

Id. at 155-56. *See also Lee v. Madigan*, 358 U.S. 228, 237 (1959). It is for this reason that "[i]n a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt." *United States v. Spock*, 416 F.2d 165, 180-81 (1st Cir. 1969) (citing *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)).

As a matter of due process, all of the elements of a crime must be found by the jury. The *Enmund* elements, as consitutionally-required prerequisites of a death sentence, are equivalent to elements of the crime, and must also be found by the jury.[8]

C. Respondent's Death Sentence Was Properly Vacated Because The Jury Was Not Required To Make The *Enmund* Findings.

As the Fifth Circuit found (A12-A13), the jury instructions given at respondent's trial did not comport with the requirements of *Enmund*.

---

[8] The *Enmund* elements are critically different from statutory aggravating and mitigating circumstances, which may be found by a judge or a jury. Although a state may call a crime capital murder without requiring any of the *Enmund* findings, it cannot impose a death sentence without such findings. In contrast, no particular aggravating circumstances must be present to allow the imposition of the death sentence, and there are no mitigating factors whose presence precludes it.

(a) *Actually Killing*: The jury instructions did not require a finding that respondent actually killed. Instruction 15 only required the jury to find that Dickson was killed in the course of a robbery, whether by respondent or by "another." (TR-1418). Although Instruction 16 spoke of a finding that respondent "did in fact kill" (TR-1420), the jury was never told that the contrary statement — that respondent could be sentenced to death even if Tucker killed Dickson — was wrong. The likelihood that a juror concluded that respondent could be sentenced to death regardless of whether he personally killed Dickson was increased by the statement by the prosecuting attorney during closing arguments that "[w]e do not have to prove that he [respondent] killed this man. . . ." (TR-1310).

In any event, it is undisputed that it was Tucker — not respondent — who killed Dickson.

(b) *Attempting to Kill*: The jury instructions contained no language whatsoever requiring a finding that respondent attempted to kill.

(c) *Intent to Kill*: The jury instructions did not require a finding that respondent intended to kill. Instruction 15 stated that the jury could find respondent guilty of capital murder if the robbery was committed "with or without any design to effect the death of the said Mark Dickson." (TR-1418). Instruction 16 allowed a conviction even if the killing was done "without malice." (TR-1420). Although Instruction 15 also contained language about respondent's "consenting to the killing of the said, Mark Dickson" (TR-1418), the jury was never told that the repeated statements that it did not need to find intent to kill in order to sentence respondent to death were wrong.

(d) *Contemplation that Lethal Force Would be Used*: The jury instructions contained no language whatsoever requiring a finding that respondent contemplated that lethal force would be used.

As a matter of both Mississippi state law and due process, the *Enmund* findings must be made by the jury. Since the jury that sentenced petitioner to death was not required to make the necessary findings, his sentence was properly vacated.

CONCLUSION

This case is of no importance beyond the immediate parties. The Fifth Circuit correctly applied a controlling decision of this Court to one of the statutes identified in that decision as constitutionally infirm. Indeed, the State later amended the statute in light of the constitutional requirements articulated by this Court.

Accordingly, the petition should be denied.

Dated: New York, New York
April 2, 1985

Respectfully submitted,

/s/ JOSEPH T. MCLAUGHLIN
JOSEPH T. MCLAUGHLIN
Counsel of Record

SHEARMAN & STERLING
53 Wall Street
New York, New York 10005
(212) 483-1000

Of Counsel:
Henry Weisburg
Daniel Levin
Nicholas Rostow
Elsie Crum*
*Bar admission pending

Attorneys for Respondent

APPENDIX

CONSTITUTIONAL AND STATUTORY MATERIALS

U.S. CONST. AMEND. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND. XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

MISS. CODE ANN. § 97-3-19 (*since amended*)

§ 97-3-19. HOMICIDE; MURDER DEFINED; CAPITAL MURDER.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriffs of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

MISS. CODE ANN. § 99-19-101 (*since amended*)

§ 99-19-101. JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstance shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commis-

sion of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstance shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

MISS. CODE ANN. § 99-19-101 (*as amended in 1983*)*

§ 99-19-101. JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

---

* Language added by 1983 amendment is italicized.

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstance shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstance shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

MISS. CODE ANN. § 99-19-103

§ 99-19-103. INSTRUCTIONS; AGGRAVATING CIRCUMSTANCES SHALL BE DESIGNATED BY JURY IN WRITING; EFFECT OF JURY'S FAILURE TO AGREE ON PUNISHMENT.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such

aggravating circumstances is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

CERTIFICATE OF SERVICE

I, Joseph T. McLaughlin, counsel of record for respondent, certify that I have this day caused to be mailed via the United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to the following:

William S. Boyd, III
Special Assistant Attorney General
Counsel of Record for Petitioners
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205

This, the 2nd day of April, 1985.

/s/ JOSEPH T. MCLAUGHLIN
Joseph T. McLaughlin